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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 27 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental practice. It seeks to employ the beneficiary permanently in the United States as a dentist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the certified ETA Form 750 did not support an advanced degree professional because the petitioner identified a foreign Bachelor of Dental Science (BDS) as the minimum academic qualification. The director also determined that the petitioner had not established that it had the ability to pay the proffered wage as of the 2003 priority date. The AAO will first examine whether the petition requires an advanced degree or its equivalent, and whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The AAO will first examine whether the position requires an individual with an advanced degree, or a baccalaureate with five years of work experience. It will then examine the director's and counsel's statement with regard to the work experience stipulations on the certified ETA Form 9089. Finally it will examine whether the beneficiary is eligible and qualified for the proffered position.

Does the Position Require an Advanced Degree or its equivalent

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

For the reasons discussed below, we find that the director's conclusion with regard to whether the position required an individual with an advanced degree or its equivalent is not supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual

business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:	4 +
College Degree Required:	U.S. or foreign professional*
Major Field of Study:	Dentistry
Experience:	4 in the job offered or 4 in the related occupation dentist**

Block 15:
* Dentistry degree (D.D.S. or B.D.S.) or equivalent
** including experience in treatment of malformations of teeth, Gums and related oral structures.
*** California dentistry license

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as

stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, counsel states that the director erred in failing to recognize a professional dentistry degree or equivalent as an advanced degree. Counsel states that the director failed to apply a common sense reading of the requirements listed on the labor certification that specified a requirement of a U.S. or foreign professional dentistry degree or its equivalent. Counsel states that references to D.DS or B.D.S. degree were only examples of the types of degrees that are recognized as constituting such an equivalency. Counsel also notes that the petitioner specified four plus years on the labor certification thus exhibiting an educational requirement that was beyond the equivalent of a U.S. baccalaureate degree.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

In reviewing the terms of the labor certification, the AAO cannot ignore the petitioner's use of "four plus" with regard to length of dental studies or the options of "D.D.S or B.D.S. or equivalent" outlined in Block 14 to further explain the phrase "U.S. or foreign professional" listed in Block 14 under College Degree Required. Both the D.D.S. (Doctor of Dental Surgery) or B.D.S. (Bachelor of Dental Studies) are professional degrees and the AAO would concur with counsel that by requiring four plus years of studies, the petitioner is requiring a professional degree above that of a four-year baccalaureate degree. The AAO finds that the certified labor certification, however inartfully drafted by the petitioner on the document, does require an advanced degree professional. In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is defined in the pertinent regulation as "any United States academic or *professional degree* or a foreign equivalent degree above that of baccalaureate." 8 C.F.R. § 204.5(k)(2). (Emphasis added.) Thus the AAO withdraws the director's determination with regard to whether the labor certification required an advanced degree professional.

We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous

treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, an advanced degree in an unrelated field combined with five years of experience in a relevant field will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

With the I-140 petition, the petitioner submitted an evaluation report dated April 25, 2001 written by [redacted] states that based on the beneficiary's [redacted] he has the professional equivalent of a doctor's (D.D.S.) degree in dentistry, plus a specialization in orthodontics from an accredited U.S. institution. The record also contains the beneficiary's diplomas and his transcript of four years of dental studies. In response to the director's RFE, counsel submitted an additional statement from [redacted] dated December 12, 2007. [redacted] states that a foreign first professional Bachelor of Dental Surgery (B.D.S.) degree, even if obtained in four years as in the beneficiary's case, constitutes the professional equivalent of a professional Doctor of Dental Surgery (D.D.S.) degree issued by a United States dental school. [redacted] added that the bachelor degree is not to be confused with U.S. bachelor's degree, as the program leading to them is entirely profession-oriented, and has no liberal arts courses.

The AAO also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.accrao.org/ register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

With regard to post secondary studies in dentistry in India, EDGE notes that the Bachelor of Dental Surgery represents "attainment of a level of education comparable to a first professional degree in dentistry in the United States." EDGE also states that a Master of Dental Surgery, awarded upon completion of one to three years of study beyond the Bachelor of Dental Surgery represents a level of education comparable to a master's degree in the United States.

Because the beneficiary does have a foreign professional degree and a Master's of Dental Surgery, the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act as he does have the minimum level of education required by the certified ETA 9089.

The Petitioner's Ability to Pay the Proffered Wage

The director also determined that the petitioner had not established its ability to pay the proffered wage as of the 2003 priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 5, 2003. The proffered wage as stated on the Form ETA 750 is $66.50 an hour or $138,320 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2001.[3] On the petition, the petitioner claimed to have an establishment date in June 1, 1994, a gross annual income in excess of $500,000, and currently to have six employees.

[3] The AAO notes that the record contains a Form G-325A Biographic Information submitted by the beneficiary when he filed his I-485 Application to Adjust Status. This document indicates the beneficiary ended his employment with the petitioner as of April 2004.

In support of the petition, the petitioner submitted no evidence as to the petitioner's ability to pay the proffered wage. On November 2, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the 2003 priority date.

In response, the petitioner submitted Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for the years 2003 to 2006. Counsel stated that the petitioner's tax returns indicates that [redacted] is the 100 percent owner of the petitioner, and thus he has sole authority over the financial resources of the corporation including authority to allocate discretionary financial resources, such as his officer compensation, as well as outside service expenses paid to contract employees such as dentists.[4] Counsel also submits copies of the petitioner's owner and sole shareholder's Forms 1040 for tax years 2003 to 2006; IRS Form W-3 Transmittal of Wage and Tax Statements, that indicates payment of [redacted] in salaries and wages compensation in 2006; Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2006 that that indicates payment of [redacted] in total payments; two Forms EDD Quarterly Wage Report for the last quarter of 2006 and the third quarter of 2007 that reflect eight and ten employees including [redacted] for the respective quarters;[5] and copies of four payroll statements that indicate biweekly wages of [redacted] paid to [redacted].[6] Counsel also submits an itemized list of household expenses for [redacted] that indicates monthly expenses of [redacted] or yearly expenses of [redacted] Finally counsel submitted a letter from [redacted] that states the petitioner intends to employ the beneficiary as a dentist earning [redacted] on a regular, full-time basis upon the issuance of his lawful permanent resident status.

Counsel submitted copies of the petitioner's quarterly wage reports for two quarters of 2007 that show that the petitioner did not paid any wages to the beneficiary during these two quarters.[7] The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 19, 2008, denied the petition. In particular the director stated that the petitioner had not provided specific evidence that wages for outside services or purchases services noted on the petitioner's tax returns were paid to contract employees, or that any such contract employees were dentists whose services would no longer be required.

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[4] The AAO notes that the petitioner's use of contract dentist services raises the question as to whether the beneficiary will be an employee or a contractor.

[5] The quarterly wage reports do not reflect any wages paid to the beneficiary.

[6] Three paystubs are for the period October 20,2007 to November 30, 2007. A fourth paystub is for the same biweekly period of October 3, 2007 to November 16, 2007 with another [redacted] in wages provided to [redacted] The year to date salary as of November 30, 2007 is [redacted]

[7] As stated previously, evidence in the record indicates the beneficiary worked for the petitioner from July 2001 to April 2004.

On appeal, counsel asserts that the petitioner's totality of circumstances should have been considered and cites *Matter of Sonegawa* 12I&N Dec. 612 (Com. 1967). Counsel states that the director should take into consideration that the petitioner is a professional services corporation with a single 100 percent shareholder and owner. Counsel states that the petitioner makes substantial discretionary deductions to avoid double taxation. Counsel also notes that much of the net income of the petitioner was deducted on a discretionary basis prior to the end of each tax year, and that much the net income would only appear on the individual tax returns of the petitioner's owner. Counsel notes the petitioner's gross income for tax years 2003 to 2006, and states that minus the petitioner's documented expenses, the petitioner had more than sufficient financial resources to pay the proffered wage. Counsel adds that the officer compensation noted on the petitioner's tax returns and the expenses identified as either "purchased services" or "outside services" on the Statements accompanying the petitioner's tax returns are financial resources available to the petitioner to pay the proffered wage to the beneficiary.[8]

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003 or during the relevant period of time in question. Thus, the petitioner has to establish its ability to pay the entire proffered wage of [redacted] as of the 2003 priority year and through tax year 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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[8] Based on counsel's analysis, the following funds would have been available to the petitioner: [redacted]

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[9] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns reflect the following information for the following years:

	2003	2004	2005	2006
Net income	[redacted]			
Current Assets				
Current Liabilities				
Net current assets				

The petitioner has not demonstrated that it paid any wages to the beneficiary during the relevant period of time, or that it had sufficient net income or net current assets during the relevant period of time to pay the entire proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2003 or during tax years 2004 to 2006 based on wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel reiterates that the petitioner should be viewed as a personal services corporation with l00 percent shareholder and officer. The AAO notes that the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For

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[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [redacted] holds 100 percent of the company's stock and performs the personal services of the dental practice. According to the petitioner's 2003 to 2006 IRS Form 1120 Schedule E (Compensation of Officers), [redacted] elected to pay himself [redacted] respectively. These figures are not supported by [redacted] W-2 Forms for respective years. With regard to the actual wages and salaries paid by the petitioner as described in the Quarterly Wages Reports for two quarters, the petitioner pays similar wages to its employees, with significantly varying wages of [redacted] during the same two quarters. We do note here that the compensation received by the company's owner during these four years and his wages as documented by the two quarterly report were not fixed amounts.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of his personal service corporation medical practice. In the instant matter, the petitioner has identified the officer compensation for the respective years and in part has identified wages provided to [redacted] for the end of tax year 2006 and one quarter of 2007. Thus, the record does contains some evidence as to the employee-owner's flexibility to set his own salary and officer compensation.

Counsel notes that the petitioner in its Forms 1120 statements identified further expenses for outside or contracted services. Counsel identifies these expenses as an additional financial source to pay the proffered wage. These figures for tax years 2003 to 2006 are as follows: [redacted] As the director correctly noted in his decision, the petitioner provides no further explanation as to the contracted services. Thus, the AAO cannot determine whether these figures could be utilized as additional financial resources. If the figures represent non-employee compensation for dental or other services rendered, they are more aptly described as wages paid to others that cannot be utilized to establish the petitioner's ability to pay the proffered wage. If the petitioner intends to establish that non-employees presently compensated under the "purchased services" would be replaced by the beneficiary, and thus the compensation provided to these non-employees would be available to pay the beneficiary, the petitioner would have to provide further evidence of the types of services provided, the amounts paid for the services, and the individuals

providing said services. Thus, the AAO will not consider the monies spent on purchased services as additional funds available to demonstrate the petitioner's flexibility to pay the proffered wage.

When considering the sole officer/shareholder's compensation as a source of additional financial resources, the AAO notes that [redacted] in his letter submitted on appeal did not state his willingness or ability to forgo his officer compensation to pay the beneficiary's proffered wage. [redacted] merely states that the petitioner will pay the beneficiary's proffered wage. Thus a crucial element of utilizing officer compensation, the officer's willingness to do so, is not found in the record. Further if only the petitioner's officer compensation is considered as a source of additional funds, in tax years 2004 and 2005, in which [redacted] received compensation of [redacted] and [redacted] after paying the proffered wage of [redacted] and his yearly expenses of [redacted] would be left with -[redacted] in officer compensation. The officer compensation figures in these years are not significant enough to utilize officer compensation as the basis of the petitioner's ability to pay the proffered wage.

As previously stated, the petitioner submitted the first two pages of its owner's personal tax returns for tax years 2003 to 2006. These returns indicate the following varying amounts of adjusted gross income for the petitioner's owner: [redacted] and [redacted] in 2006. The tax returns indicate the following wages, salaries and tips for the two persons jointly filing the returns: [redacted] in 2006. The record does not contain any W-2s for [redacted], therefore the record is not clear as to whether the indicated wages, salaries and tips listed on the individual tax returns is only for the dental practice.

The quarterly tax returns submitted to the record show a limited picture of the petitioner's flexibility in setting [redacted] compensation, while indicating very little variation in the wages for the remaining staff members. The record suggests that the petitioner's actual dental operations may be performed by compensating other non-employee dentists, but this is not clearly established in the record.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we cannot conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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[10] The significant adjusted gross income for tax year 2004 appears to be based on capital gains of [redacted] rather than [redacted] earned wages.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, there are significant gross receipts during the time in question, with varying amounts of officer compensation. The petitioner is a profitable business for its sole shareholder/owner. The record is not clear however, with regard to the actual salary and combined compensation of the sole owner/shareholder during the period of time in question. The record also contains no evidence that [redacted] is willing to forego any officer compensation to pay the proffered wage. Further the significant deductions mentioned by counsel that appear on [redacted] individual tax return are compensation for outside services, and as such would not be considered as s source of additional funds to pay the proffered wage.

With regard to the total wages paid to all employees, the record reflects significant wages paid to [redacted] for at least two quarters, one in tax year 2006 and one in tax year 2007. The same quarterly reports indicate significantly lower salaries for the remaining eight to ten employees, which suggest that [redacted] is the only dentist paid a wage. The record is devoid of any evidence as to the reputation of the petitioner's dental practice and any replacement theories with regard to the beneficiary's future employment. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO questions whether the petitioner has established that the beneficiary has the requisite four years of work experience. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

With the initial I-140 petition, the petitioner submitted a reference letter dated April 5, 2001, written by [redacted] who describes his knowledge of the beneficiary's work, as a dental student, as a postgraduate resident in the department of orthodontics, and, finally, as a practicing dentist. In his RFE dated November 2, 2007, the director requested a letter from a current or former employer giving the name, address and title of the employer and a description of the work experience, including specific dates of employment and specific duties. In response, the petitioner submitted a letter written by [redacted] dated November 12, 2007. [redacted] states that the beneficiary was employed on a fulltime basis as a dentist of the [redacted] specialty dental clinic from January 1986 to December 1991, performing a wide range of dental and orthodontic procedures and managing the activities of the dentists and dental support personnel employed by the clinic. [redacted] continues that the beneficiary continued to be associated with [redacted] specialty clinic as a self-employed dentist and dental consultant from January 1992 to February 2001.

The letterhead on this correspondence contains three business names and addresses: [redacted] On the ETA Form 750, Part B, the beneficiary represents his employment from January 1985 to December 1991, [redacted]

Thus, the address for the beneficiary's employment as outlined on the ETA Form 750 differs from the addresses provided by [redacted] in this letter. The years worked in a dental clinic in India also vary slightly with [redacted] stating the beneficiary began his work at the Naware clinic in January 1986, while the beneficiary on the certified ETA Form 750 claims an earlier 1985 date of employment with a different clinic. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It

is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further clarification as to the different addresses, and times of employment, the record does not establish that the beneficiary has the four years of requisite work experience prior to 2003. Thus the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.